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Property and Emotions

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Relatively little has been written on the connection between property and emotions from a legal perspective, despite the centrality of property in everyday life and the complex relationships that exist between owners and their property. Scholars working in other disciplines have analyzed these links, identifying 'proprietary' emotions and corresponding emotional traits. However, little has been mapped onto the field of law. This paper looks at key emotions surrounding property as identified in psychological and, to a lesser extent, sociological literature. After mapping these onto selected areas of property law, it posits the need for a deeper and more collective field of inquiry.

Introduction

In October 2012, Londoner Daisy Jenkins cradled her beloved American bulldog Tyson as it died after being stabbed 23 times by an assailant. The attack was so savage that one of the knives was bent in half, and an attending veterinary surgeon said that he had never seen such horrific injuries (*Hampstead and Highgate Express*, 11 October 2012). Police later arrested a man on suspicion of causing criminal damage- a fairly standard offence, corresponding to what is sometimes called criminal mischief in the United States, the essence of which is deliberately or recklessly damaging someone else's property. However, Ms Jenkins failed to see the killing of her pet dog as mere harm to a material possession, and her response was simple: "[i]t's not criminal damage, it's murder." The notion that Tyson's killing was no more than criminal damage certainly seems counter-intuitive, but why should this be so? The answer seems to be that Tyson, though the property of his owner, was more to her than just a mere commodity.

The question of whether, and to what extent, property is more than a commodity is one that pervades property law. Recent theorists have struggled with the problem of how the essence of property should be encapsulated. A wide range of models have been formulated (Alexander, 1997; Singer, 2006; Peñalver, 2009), but most have tended to focus on the proper balance to be struck between the rights of the owner and the wider public interest. However, some commentators, most notably Radin, prefer a more qualitative approach, which seeks to distinguish different types of property by concentrating on the meaning of the property to the owner and the character of the relationship between the owner and the property (Radin, 1982, 1993; see also Blumenthal, 2009). Adopting Radin's analysis, it makes little sense for the law to treat items of property as mere commodities. Indeed, over a century of psychological research has demonstrated that property is much more than that. To some extent, one's property and possessions are part of one's very self.

Relatively little has been written on the connection between property and emotions from a legal perspective, despite the centrality of property in everyday human life and the significance which legal systems and individuals attach to property rights. From a psychological perspective, scholars have identified what we might term 'proprietary' emotions, such as material possession attachment and place attachment; such research explores what property means to us as individuals and a society, and the basic emotional traits associated with the broad constructs of 'ownership' and 'possession' (Bloom, 1991; Rudmin, 1991; Beggan and Brown, 1994). So far, however, little of this research has been mapped onto the field of law. Scholars have looked at the connection between property and emotion in the family home (Barros, 2006); the power of the state to seize private property for public use, known as 'eminent domain' (Nadler and Diamond, 2008); and the law of adverse possession (Conway and Stannard, 2013), but other areas remain relatively unexplored. The paper aims to address this deficit by looking at the key emotions surrounding property as identified in psychological and, to a lesser extent, sociological literature. Focusing primarily on the US legal system, it analyses how these emotions are reflected in selected areas of property law and questions how they might legitimately infuse and shape the discipline as a whole. It concludes by signposting directions for future research.

I. 'Proprietary' Emotions

Modern legal systems draw a clear line between the relationship of a person to others, and his or her relationship to property. However, this dividing line is not as clear as it seems. In a celebrated study written over twenty five years ago, the American psychologist Russell W Belk (1988) argued that our possessions were a major contributor to and reflection of our identities. In the same way, Marsha Richins points

out (1994a) that the character of a person can often be revealed by his or her objects of value; a man whose most treasured possessions are a Bible and a wedding ring will probably differ in many ways from one who cares more deeply about his snowmobile and hunting rifles (Richins, 1994a and 1994b; Ferraro, Escalas and Bettman, 2011).

The affective connections between ourselves and our possessions are clearly reflected in the range of emotions that can be applied to owning property. As Aaron C Ahuvia points out (2005), the word 'love' is used as often with objects and activities as with people, and similar parallels can be drawn in relation to other emotions (Sherry and McGrath, 1989). Thus a piece of property, such as a car, can be an object of pride and admiration when driving well, yet a source of extreme irritation (perhaps even anger) when it breaks down; the latest 'must have' item of clothing or Smartphone can be adored by its new owner, perhaps to the point of a borderline romantic infatuation, but trigger jealousy and resentment from a relative or friend who does not have the same thing. Yet there are some emotion clusters that are of particular importance to property- namely the notion of 'attachment' (Bowlby, 1969; Cassidy and Shaver, 1999; Park, McInnes and Priester, 2008:3), and the distinct (yet related) subcategories of 'material possession attachment' and 'place attachment'.ⁱ

(a) Material Possession Attachment

Emotional attachment to a specific material object, the nature of which can change over time, can be based on an ongoing personal history between the person and the possession (Kleine and Baker, 2004; Schulz Kleine and Kernan, 1989). Typical examples might include one's feelings toward a wedding ring, an old family photo album or favorite holiday souvenir, all of which are imbued with emotional significance and have a

sentimental value far beyond their economic worth. The ongoing narrative of association between the person and the object renders these items irreplaceable if lost or damaged.

Two aspects of material possession attachment are particularly relevant. First, there is a lot more to the concept than simply liking or valuing an object; material possession attachment encompasses a much stronger set of emotions (Kleine and Baker, 2004:6; Kleine, Kleine and Allen, 1995). Secondly, it involves not so much possession in the physical or legal sense- though obviously this will often be the case- but rather psychological appropriation in the sense that the object is perceived as 'mine' (Kleine and Baker 2004:2). This appropriation involves what has been described as 'decommodification'; in effect, the person forms an emotional relationship with the object in question. In sum, material possession attachment is about much more than owning, possessing, valuing or even appreciating goods; it is the quality by which such goods cross what has been termed the boundary between 'me' and 'not-me' (Kleine, Kleine and Allen, 1995).

(b) Place Attachment

Place attachment, in contrast, denotes the bonds a person develops and maintains with a particular location (such as his or her home town, or a favorite holiday destination), 'an emotional bond formed by an individual to a physical site due to the meaning given to the site through interactional processes' (Milligan, 1998; Altman and Low, 1992; Hidalgo and Hernández, 2001). As might be expected, place attachment bears numerous similarities with material possession attachment; in particular, it involves a similar psychological process of appropriation by which the place becomes part of the person's identity (Milligan, 1998:16-17). However, two key factors distinguish place attachment

from material possession attachment: the subject matter's comparative permanence, and its immobility.

II. How Are These Emotions Reflected in Selected Areas of Property Law?

What follows is a highly selective discussion, intended to illuminate the ways in which proprietary emotions- particularly those of attachment- manifest in law's treatment of property.

(a) Criminal Law Offences

Most modern systems of criminal law draw a clear distinction between offences against the person (such as homicide, assault, and rape) and offences against property (such as theft, fraud, and criminal damage or mischief). As George Fletcher pointed out in 1978, we are now accustomed to thinking about this distinction in terms of the interests protected by these different types of crime; offences against the person focus on the physical integrity of the victim, while his or her property rights are respected by punishing offences against property (Fletcher, 1978:30). To what extent does the causing of emotional harm fit within this dichotomized frame of reference? At first sight it would appear to be more relevant to offences against the person, but even here the tendency of the courts is to be wary of penalizing what is often termed 'mere' emotional distress, at least where it is not accompanied by a recognizable psychiatric diagnosis (Garfield, 2009; Stannard, 2010). Conversely, it has been argued that, from a historical perspective, there is a lot more to property offences than the traditional dichotomy might suggest, and that even such a basic property offence as theft has as much to do with protecting the victim's possession- a concept with considerable emotional

overtones– as his or her economic interests in the property stolen (Fletcher, 1978:30-57). Similar emotional overtones can be seen in related areas of criminal law, such as the right to use force in defense of property. For example, the so-called ‘castle’ doctrine found in certain legal systems permits citizens to use lethal force in defense of the home (Carpenter, 2003; Drake, 2007), something which reflects not only the importance of the home as a pre-eminent place of safety but also the other emotional attachments associated with it. In the same way, Sharfstein argues that courts “routinely anticipate that people will resort to deadly force over even the most picayune trespasses” to land (Sharfstein, 2012: 639). As we have seen, the law takes less account of emotional attachments to personal property, but this is something that could well be addressed, either in the context of sentencing or by a greater willingness to bring emotional trauma within the scope of offences against the person (Miller, 1979; Stannard, 2010)

(b) Recovery of Compensation

Similar considerations apply where compensation is claimed in civil courts by a person whose property has been wrongfully destroyed or damaged. The law’s standard approach is to make an award based on the market value of the property, which will often be simply the cost of replacing it with an equivalent item, but there are cases where courts have realized that the kind of emotional attachments we have been discussing make the property irreplaceable. A good example is the English case of *O’Grady v Westminster Scaffolding* (1962), described in the words of the presiding judge, Mr Justice Edmund Davies, as a “touching tale of loyalty and devotion”. The owner’s classic car, “Hortensia”, was badly damaged due to the negligence of the defendants, and the cost of repairs exceeded the car’s value. The owner would have been expected to scrap the car, and obtain a replacement. However, this was no ordinary car; in the words of the judge, “it was his pride and joy, and it– or perhaps I

should say 'she'—... repaid his attentions by serving him well in his work as a commercial traveler". So the owner went ahead and had the repairs done, leaving the court to decide whether damages should be restricted to the cost of replacement. The owner was allowed the full cost of the repairs, based on his obvious attachment to the car, the fact that he had spent a lot of time and money on her over the years, and the lack of evidence that an equally good replacement could have been obtained. What goes for inanimate property applies even more strongly in the case of pets. In *Corso v Crawford v Cat and Dog Hospital Inc* (1979), for example, a case involving the wrongful disposition of the remains of a dead dog, the New York Civil Court declared that a pet occupied a special place somewhere in between a person and a piece of property, the essential factor being that (unlike other property) it was capable of returning affection as well as receiving it. For this reason it has been argued that claimants whose companion animals are wrongfully killed should at least be entitled to the same kind, though not necessarily the same magnitude, of damages as parents of young children who are wrongfully killed (Wise, 1998).

(c) Legal Contests Involving the Home

Despite recent economic trends, rates of home ownership remain high in the US and in other countries which promote home ownership. The concept of 'home' has spawned a vast amount of literature in recent years, much of which emphasizes the complex and multifaceted nature of the concept (Dovey, 1985; Easthope, 2004; Barros, 2006; though Stern, 2009 is more critical of the idea that the home is a 'special' type of property). Thus for Thompson (2007: [1]), the home is the "most intimate space we inhabit...the place where our most significant relationships are nurtured [and] where we can impart a sense of self in both physical and psychological ways." For Low (2008: 233) the emotions associated with it can be not only "proactive" ones such as love, warmth, trust

and security, but also “reactive” ones associated with defensive feelings and a desire to be protected from real or imagined dangers. The law recognizes the inherently unique character of the home in, for example, protecting it from external threats (the ‘castle doctrine’ is one illustration). Yet where the home is at the centre of private legal disputes- those between individuals and/or non-state organizations- the emotional significance ascribed to it varies significantly.

The types of attachment highlighted earlier have fluid boundaries, and material attachment often shades into place attachment when analyzing the home. In the matrimonial context, Anthony has described the home as an “important third party in the marriage” (Anthony, 1997: 1)- an observation that applies to most intimate familial relationships. In relationship break-ups involving minor children, the custodial parent is often granted the family residence in the absence of a mediated agreement imposing something else. Here the law is prioritizing the children’s needs, recognizing the nurturing and stability aspects of the home and the emotional ties to it from a child welfare perspective. The custodial parent’s material and place attachments are recognized vicariously through his or her children, though these attachments may have changed significantly during the demise of the relationship itself. Thompson has pointed out that meanings of home are “disrupted, changed and lost when families...fall apart” (2007: [1]); instead of being a source of comfort, familiarity and shared memories, the home can become a source of pain that symbolizes the loss of the intact family (Anthony: 4) as well as lost hopes and dreams (Thompson, 2007: [18]). Meanwhile the non-custodial parent must establish a new home environment and begin the process of creating new and meaningful ties in unfamiliar surroundings, while negotiating the loss of the shared home, the routine of family life and the neighborhood ties that went with it (Thompson, 2007: [18]).ⁱⁱ

When third parties, such as lenders and creditors, become part of the legal scenario the picture changes dramatically because the home is the focus of an entirely different dispute and emotional attachments are less relevant. In mortgage foreclosures- a frequent occurrence in the wake of subprime lending and high rates of residential mortgage default- the emphasis is on the home as a capital asset to be sold, in the absence of debtor-protective measures such as the right to reclaim the property if the debtor can find the money (so-called 'redemption rights') (Jacoby, 2010). Similar trends can be seen in consumer bankruptcy actions; the emotional well-being of those who live in the home (both adults and children) is disregarded, unless individual state exemption laws protect the property from liquidation (Hynes, Malani and Posner, 2004). Conscious of the public policy interest in allowing those who loan money against the security of the home to recoup their debt if things go wrong, the law's mantra is to sell and reimburse if necessary. Material and place attachments to the home tend to be overlooked, though commentators have argued for a more reflective legal approach which preserves the primary residence where possible. For example, Baker has proposed a 'right to rent' scheme whereby homeowners would be able to rent the property back after foreclosure to protect the shelter aspect of the home and prevent forced exit by minor children (Baker, 2008). And while this proposal is not specifically addressing emotional attachment concerns, the psychological primacy of the home is implicitly recognized.

Finally, eminent domain can cause extreme public reactions (Nadler and Diamond, 2008: 2), and unlike creditor situations, often causes the loss of a home in circumstances completely beyond the homeowner's control. Under the Fifth Amendment of the US Constitution, the right of a government (or its agent) to expropriate private property for public use can only be exercised if the owner is given just compensation- typically set at the fair market value of the property (Eagle, 2013). This blunt financial model treats the home as mere 'bricks and mortar'; it does not acknowledge the outrage caused by a forced taking, let alone the psychological loss of the home as a repository of memories

and as a symbol of personal and familial identity; the physical and emotional investments in the property over time; or the loss of neighborhood and community when private citizens are forced to relocate from one area to another under the guise of 'public good' (Coletta, 1998; Powell, 2006). Fried (1963) has described the loss of a home in these circumstances as similar to the death of a loved one- an analysis which resonates with theories of material attachment and place attachment. In suggesting ways in which the law might take account of home as a special type of property, Nadler and Diamond (2008: 14-15) posit different compensatory models to factor in the 'subjective value' of the home- such as applying a multiplier to its fair market value, or increasing the property's valuation by a set percentage (though one could argue that compensation models can never measure emotional attachment). Meanwhile Powell (2006), conscious of the psychological effects of regulatory takings, suggests retaining the market value baseline, alongside less expansive powers of eminent domain.

(d) Inheritance Disputes

Set against the loss of a loved one, inheritance disputes within families occur at an emotionally charged time and are a frequent source of conflict (Accettura, 2011). Those involving adult children following the death of a parent are uniquely complex, divisive and destructive, as unequal estate distributions, parental disinheritance or simple disagreements over 'who gets what' reignite "old issues of sibling rivalry and dominance" which have festered for years (Folberg, 2009: 8; Safer, 2012). Some disputes are driven purely by financial gain; but in many instances, it is the fact that specific bequests are viewed as posthumous representations of "love, validation, and importance" between parent and child (Accettura, 2011: 2) that is the real problem.

The symbolic quality of specific items of property is also an important factor (McMullan, 2008:82). A dead parent's personal possessions generate particularly strong feelings and inheritance expectations- for example, specific items of jewelry (a mother's wedding ring, a father's watch), or a dead parent's prized possessions (a vintage car or music collection lovingly assembled over time). Such items have a sentimental value unrelated to their economic worth, even outside the inheritance context, and generate strong material attachments. On the death of a parent, these attachments are assumed and perpetuated by the child who claims it for him/herself as an ongoing narrative of association with the decedent. In short, the property now symbolizes the dead parent.

When siblings are fighting over their 'old' family residence where they grew up together with their parents,ⁱⁱⁱ material attachment once again shades into place attachment. The property itself is a repository of memories; each sibling's emotional ties to it are unique, often conjuring up nostalgic images of warmth, security, and growing up as a family. The same is true of old family cottages and vacation homes where siblings holidayed with their parents. In many cases, parents (acting with the noblest of intentions) leave vacation properties to their children as shared owners, passing them on "like a precious heirloom, to be filled with new memories" (Hollander, Fry and Hollander, 2013: 8). All too often, the result is discord when one sibling insists on keeping the property to recreate their own childhood idylls and another resents having their inheritance tied up in a place which they now only value as a cash asset. Vacation properties are a fertile source of litigation (Hollander, Fry and Hollander, 2013), though American courts cannot simply overturn an estate distribution since they have no authority to vary the terms of an otherwise valid will. Instead the law's approach is to sell and apportion- the typical default position where two parties are fighting over something which cannot be split into separate parts. The end result is obvious: one sibling's financial gain is the other's psychological loss, creating an emotional harm that cannot be compensated by giving that brother or sister a share of the money raised by selling the property.

III. Conclusion

In *The Passions of Law*, Susan Bandes neatly summed up the overarching theme of law and emotions scholarship in the four words of her opening sentence: "Emotion pervades the law". Property law is no exception. If there is one theme running through the literature we have discussed, it is this: people exhibit identifiable emotional attachments to material objects, which influence how the latter are perceived and valued. The strength of these attachments and the influence that they exert is something that cannot be denied, and if judges and law-makers are to be properly informed in their approach to problems of property law, they cannot afford to be ignorant of such matters.

A more difficult question is the extent to which property law should recognize and reflect emotional attachments. While it may be tempting to suggest that they should be more systematically acknowledged across the board, a universal approach would be neither feasible nor desirable. Not feasible, because emotional attachments are context-specific: they vary according to the type of property, the individual's affective connections to it, and the circumstances in which he or she is confronted with the loss of, damage to or exclusion from a particular piece of property. Not desirable for two reasons: because not all such attachments deserve equal weight, and because they may come into conflict with other more traditional 'commodity' interests and investment-based dynamics. These are questions for another day, but the answer cannot be found by simply looking through the lens of property law and not engaging with scholars working in other disciplines. Insights and perspectives from the fields of psychology, sociology and economics are essential if we are to fully understand the mismatch between the law's treatment of property and the property's emotional resonance, and suggest meaningful ways of countering this.

In an influential article written almost a decade ago, Terry Maroney stressed the need for law and emotions to embrace a range of established disciplines in order to be recognized as a specialized field in its own right (Maroney, 2006). The brief analysis that we have undertaken here has highlighted not only a number of key areas in which emotion pervades property law, but the extent to which insights from other disciplines can affect both our concept of property itself and law's treatment of it. It is only when we allow these insights to infuse the legal discourse of property law that property law can take its proper place in the law-and-emotion universe.

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ⁱ We do not address a third category- 'brand attachment'- because it is less important in the social and psychological contexts we prioritize.

ⁱⁱ Beyond the physical space of the home, there is the process of dividing the objects within it- many of which (such as family photos or treasured gifts) generate their own strong material attachments.

ⁱⁱⁱ Assuming that the family stayed in the same house over the years. If they relocated, each sibling will have very different material and place attachments to each 'new' property.